



January 19, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: State Savings Arrangements Safe Harbor

RE: Comments on Department of Labor Proposed Rule Regarding Savings Arrangements Established by States for Non-Governmental Employees (RIN 1210-AB71)

To Whom It May Concern:

The Aspen Institute's Financial Security Program (FSP) appreciates this opportunity to provide comments on the U.S. Department of Labor's (DOL) Proposed Rule Regarding Savings Arrangements Established by States for Non-Governmental Employees (RIN 1210-AB71).

Aspen FSP, formerly the Initiative on Financial Security (IFS), is dedicated to solving the most critical financial challenges facing America's households, and to shaping policies and financial products that enable all Americans to save, invest, and own. As such, Aspen FSP supports DOL's efforts to expand retirement plan access to low- and moderate-income families who do not otherwise have access to a plan at work.¹ As you know, many states are pursuing initiatives that would further this goal, but they have called for federal guidance to provide the legal certainty necessary to move forward. Aspen FSP thus welcomes DOL's recent provision of this guidance.

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Significant step forward

On November 18, 2015, DOL published two legal opinions: (1) a proposed rule regarding savings arrangements established by States for non-governmental employees; and (2) an interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974 (RIN 1210-AB74). Aspen FSP considers both of these actions as major steps forward for expanding retirement security for low- and moderate-income workers.

Most Americans with retirement savings build up their nest egg through workplace savings programs. This is no accident: the federal government has created a number of tax structures to encourage employers to offer plans for their employees, including 401(k)s, 403(b)s, and SIMPLE and SEP IRAs. But low- and moderate-income Americans, especially those working part-time or for small businesses, are less likely than their wealthier counterparts to be offered a tax-preferred retirement plan at work. Studies indicate that most Americans – including low- and moderate-income ones – take advantage of retirement plans at work *if offered*.²

But as a result of low employer offer rates, many low- and moderate-income workers reach retirement with little to no private savings. In fact, in 2014 nearly one-third of non-retired Americans reported having absolutely no private retirement savings or pension.³ Though most of these individuals will have access to Social Security, the indispensable bedrock of the U.S.'s retirement system, those benefits are often too low to maintain retirees' standard of living.

Ideally, this gap in retirement plan access would be closed with a federal auto-IRA program, as President Obama proposed as part of his fiscal year 2010, 2011, 2012, 2013, 2014, 2015, and 2016 budgets, or some other universal solution. However, given congressional inaction, Aspen FSP supports states that are stepping into the void and offering auto-IRA or other retirement programs of their own.

Moreover, Aspen FSP believes these programs strengthen the role of private financial service providers. State savings arrangements give employees a good deal of control over their accounts, including the ability to roll them over to investment plans managed by private firms. Many of the state plans will also likely be managed by private investment companies in partnership with states and through a competitive bidding process, demonstrating a key role for the private sector in these programs.

By providing legal guidance to states regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to their state programs, DOL has helped reduce confusion and uncertainty in state capitals across the country and has paved the way for a meaningful expansion of retirement coverage.

¹ For more information, see David S. Mitchell & Jeremy Smith, "Recent Department of Labor Rules Open the Door for States to Move Forward with Retirement Initiatives," Aspen FSP, January 2016, <http://www.aspeninstitute.org/sites/default/files/content/upload/Aspen%20FSP%20DOL%20State%20Retirement%20Issue%20Brief%20-%20Final.pdf>.

² U.S. Government Accountability Office, "Federal Action Could Help State Efforts to Expand Private Sector Coverage," September 2015, <http://www.gao.gov/assets/680/672419.pdf>.

³ Board of Governors of the Federal Reserve System, "Report on the Economic Well-Being of U.S. Households in 2014," May 2015, <http://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf>.

Importance of automatic features

Aspen FSP commends DOL for proposing a safe harbor that allows states to incorporate critical automatic features – representing some of the best current thinking in behavioral science – into their IRA plan design.

Most importantly, the proposed safe harbor makes automatic enrollment in a retirement plan possible for millions of Americans. Scores of academic studies prove that making a retirement plan available to employees through their job, while an important first step, is still not as effective as automatically enrolling those workers in the plan (with an option to opt-out).⁴ Furthermore, automatic enrollment is popular among workers, who appreciate its convenience and simplicity.⁵ This is why, over the past decade, thousands of employers across the country have opted to automatically enroll their workers in 401(k) and other retirement plans. Low- and moderate-income Americans are just as likely to benefit from automatic enrollment and should not be left behind.

Aspen FSP further commends DOL for giving states the ability to designate a default IRA sponsor or investment option for those workers who do not make an affirmative election. Ample evidence demonstrates the immense power of defaults (indeed, the aforementioned success of automatic enrollment in retirement plans is one such example). As such, state governments should be able to design a program that works well for participants even if they fail to take certain affirmative steps in the plan initiation process.

Aspen FSP also supports DOL's proposal to allow states to establish a schedule of automatic increases to the default rate of contributions to the auto-IRA program – often called “automatic escalation.” Like automatic enrollment and default options, automatic escalation is a proven way to harness the power of status quo bias to help build up workers' retirement savings.⁶

Finally, Aspen FSP appreciates that, by issuing its accompanying interpretive bulletin, DOL has also given states the option of sponsoring ERISA-regulated plans. ERISA already allows for all of the automatic features described above, and also provides built-in consumer protections (see below) and the possibility for employer contributions, which makes it a potentially valuable option for some states.

⁴ Brigitte C. Madrian, “That Was Easy: The Importance of Auto Features in Promoting Retirement Savings,” AARP Public Policy Institute, <http://www.aarp.org/content/dam/aarp/ppi/2014-10/spotlight12-importance-auto-features-promoting-retirement-savings-AARP-ppi-econ-sec.pdf>.

⁵ David C. John, “The Case for Automatic Enrollment – Stronger than Ever in 2011,” *Benefits Magazine*, May 2011, <http://www.ifebp.org/inforequest/0159990.pdf>.

⁶ Richard H. Thaler & Shlomo Benartzi, “Behavioral Economics and the Retirement Savings Crisis,” *Capital Ideas*, July 2013, <http://www.chicagobooth.edu/capideas/magazine/summer-2013/retirement-savings?cat=more>.

Importance of consumer protections

Aspen FSP recognizes that allowing employers to automatically enroll workers in a retirement plan outside the confines of ERISA's legal protections carries some risk, but Aspen FSP believes the potential benefits of state-sponsored auto-IRA plans to low- and moderate-income working families justify the creation of this new legal channel.

Furthermore, Aspen FSP commends DOL for crafting a safe harbor that minimizes these risks by severely curtailing the employer's role in selecting and administering the plan, and by ensuring workers have "adequate notice" of their right to opt-out of the program and have "meaningful control" over their IRAs. Importantly, in order to gain entry into the safe harbor, states must "create[] a mechanism for enforcement of those rights." As DOL wrote in its proposal, state governments are naturally incentivized to "administer[] [the program] in accordance with the interests of the state's citizens."

As such, Aspen FSP is hopeful that states will write provisions into their auto-IRA laws that protect consumers and their money against poorly disclosed fees, fund mismanagement, and creditors' claims, among other potential retirement plan pitfalls.

Potential improvements

Aspen FSP recognizes the complexity of designing a safe harbor that is not overly onerous on states and will withstand legal challenge. Overall, Aspen FSP commends the structure and details of the safe harbor DOL constructed. However, there are a few issues that Aspen FSP thinks could benefit from clarification or revision:

- By limiting the entities that can administer safe harbor auto-IRA programs to states, the proposed regulation effectively prohibits cities, counties, other state subdivisions, and multi-state coalitions from pursuing their own auto-IRA schemes. While Aspen FSP recognizes that not all state subdivisions or regional coalitions may be up to the administrative challenge of establishing a new retirement plan for the private sector workers within their borders, Aspen FSP believes that cities and counties in states that are not pursuing their own plans – or multiple states as part of a regional coalition – should be able to petition DOL for that authority. New York City, for example, has expressed a strong interest in establishing its own plan, which Aspen FSP believes would be a positive development.
- The proposed regulation states that the program must be "established by a State pursuant to State law" and that the state must "administer the program either directly or through a governmental agency or other instrumentality." While

most references to “state” in the proposed regulation are paired with the parenthetical “(or the designated governmental agency or instrumentality),” some are not (see paragraph (h)(1)(iii) and (iv)). The aforementioned provisions make it unclear exactly how *independent* an instrumentality can be, which *program features* must be enshrined in state law as opposed to decided by an agency or instrumentality, and which *tasks* must be completed by the state itself rather than an appointed instrumentality. Many states have adopted plans that delegate administrative authority and other duties to a quasi-independent board. Aspen FSP believes that it would be helpful for states to know with certainty that such arrangements are within the safe harbor. Specifically, Aspen FSP recommends giving states flexibility to delegate authority to set default savings rates and make other key program design decisions.

- The proposed regulation never fully explains what it means when it uses the words “responsible” and “assume responsibility” in paragraphs (h)(1)(ii) and (iii), which leaves many questions unanswered. For example, do states, and by extension state taxpayers, need to take on a certain amount of legal or financial responsibility to satisfy these requirements? Can states delegate legal or financial responsibility to third parties, as is common practice in many current employee benefit arrangements? Further clarification would be helpful.
- The proposed safe harbor bars employers from receiving any “direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program.” It is unclear, however, if this requirement would bar states from combining the employer mandate with employer tax credits or other government benefits that could further incentivize employer participation. For example, it may be exceedingly difficult if not impossible for states to accurately calculate the “actual costs” accrued by each participating employer, and it may be impractical for the amount of each tax credit to vary by employer. As such, Aspen FSP believes allowing state flexibility makes sense and would suggest further clarification in the final rule.
- Regarding the required mandate at (h)(1)(x), Aspen FSP believes that states that choose to establish a savings program but do not mandate *all of the employers* in their state to participate (e.g., Illinois’s mandate only covers employers with 25 or more workers), should be afforded flexibility so that, under certain circumstances, employers not mandated to participate can still choose to automatically enroll their workers in the state plan.

Thank you for your consideration of these comments. Please contact David Mitchell at David.Mitchell@aspeninstitute.org or 202-736-3561 should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ida Rademacher". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ida Rademacher
Executive Director
The Aspen Institute, Financial Security Program